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Recognizing the Interests of the Public in Broadcast Programming

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RECOGNIZING THE INTERESTS OF THE PUBLIC IN BROADCAST PROGRAMMING

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THE ERA OF BAD FEELINGS

The 1980s offered a rather pleasant interlude for most businesses in the United States as interest rates plummeted, capitalism gained new prestige, and regulation began to disappear. For the broadcast industry, however, the era was one marred by bitter clashes with a growing number of hostile and aggressive citizen groups.

Although many of these attacks on the broadcast industry came from the so-called "religious right," those who battled with television networks, broadcast stations and cable TV systems during this decade also included such widely disparate organizations as Mothers Against Drunk Driving (MADD), the Gay Media Task Force, the AFL-CIO, Action for Children's Television (ACT), the American Jewish Committee, the NAACP, the National Organization for Women (NOW), and literally hundreds of local citizen groups.[1] By 1988, the Federal Communications Commission (FCC) had become so concerned about the possibility of certain private interest groups using the broadcast license challenge process as a weapon in their dealings with stations that the Commission adopted new rules prohibiting station owners from offering any form of pro-

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1. This list of private organizations actively attempting to influence broadcast programming practices is merely illustrative, rather than all-inclusive. MADD has been lobbying Congress for the past decade to ban wine and beer advertising on radio and television, and gathered more than 500,000 signatures on a petition to urge congressional action. The Gay and Lesbian League, as well as the AFL-CIO and NOW, all monitor television network programs on a regular basis to determine whether gay individuals, workers and women respectively are portrayed in a favorable manner, and each group has a subcommittee that works with television producers to ensure that every dramatic program on television conforms to their standards in this regard. The NAACP persuaded advertisers to boycott a PGA tournament held at an all-white country club and the American Jewish Congress exerted pressure on PBS stations not to air a CPB program "Flashpoint-Israel and the Palestinians" the group felt presented too favorable an impression of the Palestinian position.

gramming concessions to these groups without obtaining prior FCC approval.[2]

In reality, however, it was the advertiser boycott that inflicted the greatest direct damage on the broadcast industry during this decade. ABC charged that it had lost more than $14 million in advertising revenues during a single year, 1989, because of advertisers canceling their commitments for commercial time in programs targeted for boycott by various citizen groups.[3] The following year, ABC and its cable sports service, ESPN, lost more than $2 million in advertising revenues during just one sporting event, when twenty-one advertisers backed out of their agreements to purchase air time during coverage of a PGA golf tournament hosted by an all-white country club.[4] In March, 1990, another threatened boycott caused twenty-four advertisers who collectively spent more than $2 billion a year in broadcast advertising to withdraw their commercials from three tabloid television news shows, "Current Affair," "Inside Edition" and "Hard Copy."[5]

In that same year, NBC lost more than $1 million in advertising income from the broadcast of a single, controversial, made-for-TV movie, while Pepsi Cola decided to cancel its $10 million broadcast advertising campaign featuring the equally controversial Madonna when faced with boycott threats.[6]

During this decade, the number of private citizen groups involved in broadcaster or cable TV controversies grew from less than 200 to more than 500, as a Gallup Poll conducted in June, 1990, was revealing that 71% of all adult respondents believed that the quality of the nation's electronic media serv-

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2. *Broadcast Renewal Process*, 66 Rad. Reg. 2d (P & F) 708 (1989).

3. *See Iger Chastises Sponsors for Leaping Before Looking*, BROADCASTING, July 30, 1990, at 53. Bob Iger, President of ABC Entertainment, indicated that $9 million of this lost revenue came from the airing of two controversial made-for-TV movies, and $1 million resulted from refusing to cancel an episode of "thirtysomething" with a scene featuring two homosexual men in bed together. Stations affiliated with ABC also lost a cumulative total in excess of $1 million in revenues when Federal Express canceled all advertising on these stations after ABC's "20/20" carried an investigative report Federal Express felt unfairly charged the company with not meeting the terms of its contract with the U.S. Department of Defense. *Id.; see also Fed Ex ABC Ad Ban Extends to Affiliates*, BROADCASTING, Oct. 9, 1989, at 69.

4. *See Advertisers Withdraw Sponsorship of PGA Event*, BROADCASTING, July 30, 1990, at 31.

5. *See* John Dempsey, *24 Advertisers Boycott 'Affair,' 'Edition' 'Copy,'* VARIETY, Mar. 21, 1990, at 1.

6. *See* Verne Gay, *Roe v. Wade Sells Out, But Did the Advertisers Sell Out To Boycott Threat?*, VARIETY, June 17, 1989, at 1; *It Didn't Have a Prayer: Pepsi Cans $10-mil Madonna Ads*, VARIETY, Apr. 12, 1989, at 101.

ices had deteriorated significantly during this same ten year period.[7] Why then, in this otherwise relatively serene era, did there appear to be such a high level of dissatisfaction with broadcasters, and such willingness on the part of citizens to become activists in this one area of business?

Perhaps, as this paper will suggest, this unique hostility simply reflected a growing awareness on the part of the public that as federal regulation of broadcast programming diminished, broadcasters became far less willing to respond to the concerns of those audiences they served.

THE POWERLESS PUBLIC

In 1981, the FCC began rescinding its rules regulating radio broadcasting in the United States, and in 1984 it started to deregulate television broadcasting as well.[8] During this same period, the National Association of Broadcasters (NAB) was forced to abandon its role in maintaining broadcast programming and advertising standards of good practice when charged with anti-competitive conduct by the U.S. Department of Justice.[9] Congress completed this deregulatory cycle in 1984, when it enacted the Cable Policy Act, effectively denying those communities in which cable systems were located any authority to influence the programming choices of their cable system.[10]

Although in the process of being "deregulated" by the FCC, broadcasters were still required to seek renewal of their licenses at regular intervals and to comply with a limited

7. The Gallup Poll findings were reported in *Americans Fell Deluged With Unwanted Obscenity*, MILWAUKEE J., Sept. 23, 1990, at 1A. After United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), recognized the legal right of a citizen group to challenge the renewal of a broadcast license, a similar explosion of public actions against broadcasters took place, but these tended to be much more tightly focused, politically oriented attacks on specific broadcaster public information policies or hiring practices, and involved only a very narrow segment of the population.

8. *See In re* Deregulation of Radio, 84 F.C.C.2d 968 (1981); *In re* The Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076 (1984).

9. United States v. NAB, 536 F. Supp. 149 (D.D.C. 1982). The particular practice challenged by the Justice Department was a standard limiting the number of different commercials that could be aired during each commercial break. The industry sought to avoid "clutter," the broadcast of numerous short commercials during a single break, but the Justice Department claimed this practice denied small advertisers access to network television audiences.

10. 47 U.S.C. §§ 521-559 (1991).

number of programming requirements.[11] In 1987, the Commission rescinded one of these few remaining obligations, the "Fairness Doctrine," that had obligated broadcasters to offer balanced coverage of controversial issues of public importance.[12] Then, in 1991, a federal court struck down the FCC's attempt to ban "indecent" broadcast programs, leaving the "equal access" obligations for legally qualified political candidates and political advertising rules as the only major program-related regulations remaining in force.[13]

Yet, in reality, the FCC's role in regulating broadcast programming had never been as significant as the public seemed to imagine. Because broadcast networks did not need spectrum space[14] to distribute their programs to affiliate stations,

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11. As a congressional agency, the FCC cannot rescind or refuse to enforce any of those legal obligations imposed on broadcasting by Congress in the Communications Act of 1934. For that reason the Commission has not been able to realize its deregulatory policy objectives as rapidly as it would like. However, in its Omnibus Reconciliation Act of 1981, Congress did reduce the broadcast regulatory burden to some extent when it extended the broadcast television license period from three to five years, and the radio broadcast license from three to seven years.

12. *In re* Complaint of Syracuse Peace Council Against Television Station WVTH, 2 F.C.C.R. 5043 (1987). A federal court had instructed the FCC that it need not continue to enforce the Fairness Doctrine, because it was not included in the congressional legislation that the Commission was required by law to enforce. Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987). Personal attack rules and certain requirements imposed on political editorializing are the only regulatory vestiges remaining of the Doctrine today.

13. Both of these sets of regulatory requirements are of particular value to members of Congress. The "equal access" provision, 47 U.S.C. § 315 (1991), guarantees that after receiving the usual news coverage as a federal legislator during the period between political campaigns, the incumbent can then prevent any challenger from having a greater access to broadcast audiences than the incumbent has during the campaign. Caps on political advertising charges by broadcast stations allow politicians to demand the lowest rate offered by the station, even though the politician does not actually qualify for this rate. Because of these political advantages, Congress is unlikely to rescind these remaining regulatory requirements as long as they remain legally enforceable.

14. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Supreme Court affirmed the right of the federal government to regulate the programming content of broadcast stations because, unlike any other form of mass communication, broadcasters depended upon use of the scarce and valuable public resource of electronic spectrum space in order to transmit their messages. Since there was not sufficient spectrum space to satisfy the demand for broadcast channels, the court held that the privilege to use this public resource could be revoked by the federal government if a broadcaster was not operating in the "public interest." Because this narrow legal justification authorized federal broadcast program regulation solely on

the FCC could not use its broadcast licensing process to influence network programming decisions. Lacking the legal authority provided by this process, the Commission could only attempt to shape network program practices through tactics of persuasion and indirect pressure.

Until the 1980s began, the television networks were the dominant force in American broadcasting, exercising absolute control over those programs that nearly 90% of the American television audience viewed each evening.[15] However, that power this corporate triumvirate exerted over national television service made these networks very tempting targets for various political crusaders and public activists.

Through the regulation of broadcasting, the FCC was able to offer the networks shelter from both congressional interference and public attack as long as the programs they distributed conformed to basic content standards recommended by the agency.[16] Whenever some congressional committee or citizen group complained about too much violence on television, too heavy an emphasis on sexual situations, or too much commercialization in programs designed for children, the Commission could delay action and diminish tensions by pledging to convene hearings to consider these complaints at great length.

In return, the networks attempted to accommodate the Commission whenever possible, and could achieve the changes in program content the agency sought but lacked the legal authority to require through their control over television production and distribution processes in the United States. The NAB proved to be a valuable partner in this process, transforming FCC policy pronouncements into industry standards so that conformance became an image-building professional responsibility rather than abject submission to some governmental edict. In addition, the NAB's influence extended beyond that of the networks and the major market stations to gain compliance from smaller, non-network stations throughout the nation.

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the basis of spectrum usage, it could not be extended to include either broadcast networks or cable TV systems because both distributed programming only through privately owned microwave or coaxial networks. For a more detailed discussion of the significance of this distinction, see HAROLD L. NELSON ET AL., LAW OF MASS COMMUNICATIONS (6th ed. 1989).

15. A.C. NIELSEN CO., NIELSEN REPORT ON TELEVISION 5 (1979).

16. For a more detailed description of this regulatory relationship between the FCC and the broadcast networks, see DON R. LE DUC, BEYOND BROADCASTING: PATTERNS IN POLICY AND LAW 57-77 (1987).

However, this close cooperative relationship between the broadcast industry and its federal regulator was totally dependent on the FCC's continuing to furnish the networks and the nation's broadcast stations with a safe and stable competitive environment in which they could prosper. When the Commission decided instead to begin encouraging the growth of cable TV in the early 1980s, and to authorize low power television (LPTV), direct broadcast satellites (DBS) and multipoint, multichannel distribution systems (MMDS) to compete directly with existing broadcast stations, the inducement for continued industry cooperation ended abruptly.[17]

By the end of the 1980s, as cable TV networks and pay TV channels were producing and distributing their own television programs, the three major networks were no longer in a position to dictate national television program standards even if they still had wished to do so. Competition from the new Fox Network and the growing popularity of cable TV services resulted in the three network share of primetime viewers dropping from more than 90% to less than 60% of the national audience within a single decade. As this occurred, the compelling network drive became the abandonment of any standards of taste that might diminish the popular appeal of a network program.[18]

In 1981, Proctor & Gamble, a sponsor then spending some $500 million on broadcast advertising each year, demanded the right to pre-screen all television programs carrying its commercials. Proctor & Gamble then decided on the basis of this review to withdraw its advertisements from more than fifty series programs and made-for-TV films.[19] Other major advertisers soon followed its example, and industry analysts pointed

17. The FCC began to relax its regulatory constraints on cable TV in 1980 when it rescinded its distant TV signal and syndicated program exclusivity rules that had restricted cable TV signal importation rights. The agency's action was upheld against broadcast industry challenge in Malrite TV v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Commission authorized LPTV service in its Report and Order on Docket 78-253 (Mar. 4, 1982). MMDS service was authorized in its present form by ITFS Service, 94 F.C.C. 203 (1983), and DBS regulatory policy was established in Notice of Proposed Policy Statement and Rulemaking in General Docket 80-603 (Oct. 22, 1981).

18. The eroding financial strength of the networks during the 1980s is reflected in the fact that each of them fell prey to take-overs during the decade. Capital Cites Broadcasting acquired ABC, General Electric purchased NBC, and CBS was the victim of an inside take-over by Lawrence Tisch and his associates.

19. *See Butler Speech Sets Off Waves of Dispute Over Television Sex and Violence*, BROADCASTING, June 22, 1981, at 19.

to the cancellation of "Charlie's Angels," "Three's Company" and "Vegas" as illustrations of how advertiser standards were changing the nature of television programming.[20] Within a short time, though, this effort of advertisers to fill that void in program standards enforcement created by FCC deregulatory policies and the disbanding of the NAB Code Authority became much less intensive. However, many sponsors continued to insist on viewing controversial programs before allowing their advertisements to be scheduled during these shows.[21]

At this point, it appeared that broadcasters would be free to use the public resource of spectrum space to transmit virtually any type of programming they chose, no matter how offensive these shows might be to certain segments of the population. In 1987, however, the FCC under a new chairman, decided to reassert the Commission's "indecency" standard.[22] The Commission intended to limit the possibility of children being exposed to such patently offensive programs by permitting the programs to be broadcast only between the hours of midnight and 6 a.m. Not content with this modest policy objective, Congress compelled the agency in 1990 to prohibit indecent programming at any time of day or night.[23] Predictably, a federal court soon overturned this ban as being unnecessarily broad in its restraint of constitutionally protected free speech.

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20. *See Whoever Blinked, The Bottom Line Is That TV Changed*, BROADCASTING, July 6, 1981, at 29.

21. One reason Proctor & Gamble may have decided to abandon its campaign was the fact that several of the soap operas P&G owned and produced often included romantic scenes far more suggestive than the primetime shows the company was criticizing.

22. In 1978, the U.S. Supreme Court, in FCC v. Pacifica Found., 438 U.S. 726, *reh'g denied*, 439 U.S. 883 (1978), had affirmed the right of the FCC to impose more stringent controls on broadcasting, because of its use of the broadcast spectrum, and its greater accessibility to children in the home, than could legally be imposed on other media. The agency did not decide to assert this authority, however, until 1987, when it adopted its New Indecency Enforcement Standards, 62 Rad. Reg. 2d (P & F) 1218 (1987). The standards prohibited the broadcasting of content that "describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs . . . at times of the day when there is a reasonable risk that children might be in the audience." *Id.* at 1219.

23. In July of 1990, the FCC was forced by a congressional mandate to adopt a rule totally prohibiting indecent broadcast programming, even though the Supreme Court, in the *Pacifica* case, had clearly indicated that the agency could not ban such constitutionally protected speech, but could only "channel" it to those hours of the broadcast day when children were least likely to be exposed to it.

Consequently, one of the last remaining vestiges of federal authority over broadcast programming is now no longer enforceable.[24]

Ironically, then, even though the American system of broadcast regulation never allowed the federal government or its citizens to exert any significant influence on the nature of broadcast programming, the widely held belief that it did caused many members of the public to feel abandoned by government in the early 1980s. This occurred when what seemed to be the primary legal channel for challenging broadcast program practices was suddenly closed to them. As the FCC began its withdrawal from issues of program content, groups of citizens offended by particular radio and television program practices responded as those denied legal redress have often done in the past: by resorting to private pressure tactics to achieve results they believed could no longer be accomplished through the legal system.

Our Televised Cultural Environment

Although deregulatory policies in other fields have been criticized by various citizen groups during the past decade, public reaction to the deregulation of broadcasting appears to have been uniquely hostile and intense. The most likely explanation for the breadth and bitterness of these public attacks is television's equally unique role in modern American life.

The typical adult in the United States now spends more than thirty hours each week watching television, while the average child devotes almost as much time to watching television as attending school each year.[25] Because of the popularity of television viewing, the three major networks continue to exert a strong influence upon public tastes and attitudes, despite the fact that their share of the television audience has diminished by one-third during the past decade. Even today, any modestly popular action-adventure or situation-comedy series scheduled by a network will be viewed by more Americans than those who

24. *Court Throws Out FCC's 24-Hour Indecency Ban*, BROADCASTING, May 20, 1991, at 33.

25. A.C. NIELSEN CO., NIELSEN REPORT ON TELEVISION 8 (1990). The average 6-11 year old child watches television 23 hours and 39 minutes per week, or 1230 hours per year. The average seven-hour, five-day school week, during the 40 weeks most grade and high schools are in session represent 1400 hours annually. Recent studies also indicate that Americans now spend more than 40% of all their leisure time watching television. *See* ROBERT KUBLEY & MIHALY CSIKSZENTMIHALYI, TELEVISION AND THE QUALITY OF LIFE 71 (1990).

will read any bestselling novel or attend any single feature film that entire year.[26] In other words, virtually every network television series producer has a greater opportunity to influence public sentiments, beliefs and values than even the most popular of novelists or film makers.

Beyond this, those primetime situation comedy and action-adventure series Americans share as viewers provide a sense of "community" that has long since vanished from most of our lives. Lacking the comforting companionship once offered by family and neighbors, we find ourselves gossiping with acquaintances about the exploits of television characters we know more intimately than virtually anyone in our own lives.[27] With as many as 50 million other Americans joining in the viewing of a single television network program, it is not surprising that this single bond uniting us is broader and more extensive than any other political, religious or social connection we might also happen to share.

As legends of old, these modern mass cultural sagas shape public attitudes and belief, and color the characteristics of every societal value they present in dramatic form.[28] Yet, unlike traditional folklore these stories are not primitive, immutable statements of our cultural heritage, but powerfully

26. A moderately popular TV series program, such as "Perfect Strangers" or "Night Court," generally earns a Nielsen rating in the range of 15, meaning that in 15% of the nation's 92 million households, this program is being viewed. At 2.2 viewers per household, each show plays to an audience of almost 30 million people, three to four times the readership of a runaway best seller and a larger group than all but six feature films have been able to attract during the past decade.

27. In JOSHUA MEYROWITZ, NO SENSE OF PLACE (1985), the author cites a number of VCR usage studies indicating that one of the major reasons given for taping popular dramatic series, that the viewer is unable to see when broadcast, is to stay abreast of those plot lines and characters the viewer's friends tend to discuss. This is borne out by the fact that these tapes are generally erased if too much time has elapsed between the broadcast and the viewing, because the out-dated information won't serve this purpose effectively.

28. In 1988, for example, a coalition of major television program producers agreed to discourage the use of drugs, liquor and cigarettes through various dramatic devices in their network programs, developing plot lines to illustrate the evils of drug usage, and relegating drinking and smoking only to unsympathetic series characters. *See Producers Just Say "No,"* VARIETY, June 29, 1988, at 12. While no one would criticize this effort, it does raise the question of how many other crusades in the guise of television drama have been launched by these producers to achieve their own social objectives in the past.

compelling man-made myths whose themes can be skillfully shaped to influence and persuade.[29]

Network news is also the most powerful and pervasive form of public information in the United States, determining to a large extent which specific national and international issues will dominate the thoughts of American citizens.[30] Any news item mentioned on one of the three network evening news shows will be known by more than ten times as many people as will read about it in the *New York Times* or *Washington Post*, and decisions about what items to include in those nineteen minutes allotted to news during each half hour show will define the world for that 40% of the population whose primary source of information is television news.[31] This power to decide what the public should know and how each issue should be treated is of particular concern when several studies conducted during the past decade have revealed that broadcast journalists tend to have political convictions far to the left of the public they serve.[32]

It has been fashionable during this era of deregulation to argue that a competitive marketplace offering a broad variety of viewing options will soon dilute the concentration of control that has made the network television the dominant news and entertainment force in American society.[33] Unfortunately, this argument seems to be based on at least two erroneous assumptions.

The first is that the public will eagerly seek out competing non-network sources of television programming when they

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29. *See* MEYROWITZ, *supra* note 27, for case studies of how television programming has influenced, among other things, the women's movement, the concept of family, and presidential politics in the United States.

30. It is interesting to note, for example, that the *Washington Post* had been running stories about the Watergate break-in for 10 weeks before initial network television news coverage of the event transformed it into a national scandal. Similarly, several newspapers in the United States, including the *New York Times*, had provided extensive coverage of the starvation occurring in Ethiopia for several months before the first network news stories about the desperate plight of the Ethiopians suddenly galvanized relief efforts to aid these people.

31. ROPER ORGANIZATION, PUBLIC ATTITUDES TOWARDS TELEVISION AND OTHER MEDIA 8 (1989).

32. *See, e.g., RTNDA and the State of Electronic Journalism*, BROADCASTING, Dec. 12, 1988, at 68-73 (discussing several of these studies and the ethical problems they create for broadcast news editors).

33. The opposite trend is already quite pronounced in broadcast journalism, with networks and local television stations seeking mergers with international news pooling organizations and cable systems in order to reduce costs and increase the cost-effectiveness of their operations.

become available. The fact is that prime time network viewing has leveled out at 60% of the television audience in recent years and does not appear likely to diminish further in the foreseeable future. Those cable services now competing with the network seldom attract more than 1% or 2% of the audience, and then primarily with programs originally scheduled on network television.[34] The problem seems to be that while viewers may glance at cable's all-news, all-sports or all-music channels for a few minutes each evening, and even watch one or two cable-delivered features on a regular basis, they continue to want to share with others that feeling of commonality created by viewing those massively popular programs only network television provides.

The other assumption not borne out by the facts is that increasing the number of video delivery channels will automatically increase the amount of television programming produced for the public. In reality, the major constraint on television program production has never been the limited number of channels capable of delivering these programs, but rather the limited amount of capital available to produce them.[35] With each thirteen-week run of a typical, half-hour situation comedy demanding an investment of $6.5 million, and only 25% of these series currently recouping their production costs, it is easy to understand why an explosive expansion in the number of cable networks and channels during the past decade has not resulted in an equally impressive expansion in the number of television programs produced.[36] Instead, these additional video channels offer, for the most part, simply more opportunities to see the same old television network series reruns at different times.[37]

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34. *See Warner Study Promotes Acquired Product*, BROADCASTING, July 15, 1991, at 26.

35. For a more extensive discussion of those financial constraints that limit television program production, see Don R. Le Duc, *Deregulation and the Dream of Diversity*, 32 J. COMM. 164-78 (1982).

36. For a listing of current program production costs see *1990-91 Network Primetime at a Glance*, VARIETY, Sept. 17, 1990, at 35. Although cable TV network growth has resulted in a 400% increase in national TV program delivery capacity since 1979, TV program production during the same period increased less than 10%. The major effect of this increased demand for productions was to more than double the adjusted for inflation costs of each show produced. *See* David Kissinger, *Real-Life Meller for Ailing TV Moviemakers*, VARIETY, July 8, 1991, at 19.

37. This continues to be true, even as the cable industry talks of video channel compression techniques that could increase cable system capacities to 500 channels. That segment of additional channels to be devoted to entertainment would not carry additional program services, but rather

In view of the substantial amount of influence television networks continue to exert over American mass culture, why is it that our system of laws has not provided any means for making these networks responsive to the concerns of the public about the manner in which this culture is being shaped? The reason for this lack of legal responsibility is embedded in our common law tradition of legal analysis by analogy, even when the passage of time may have grossly distorted the logic of its application.

THE PRIMITIVE NATURE OF AMERICAN MASS COMMUNICATION LAW

Our Bill of Rights was adopted at a time when the only "mass communicators" were the soapbox orator and the printing press operator. The declaration of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."[38] was a sensible protection against the governmental interference with the right to speak or publish. Even after some newspapers' owners became publishing giants in the late 19th century, able for the first time to mobilize public opinion on a nationwide basis, there were still enough competing papers in each area to limit the influence of these publishers.

When radio broadcasting began in the 1920s, law encountered the first communications medium that delivered its message directly into each family living room, accessible to everyone including the youngest of children. Within a few years, radio had also become the first truly pervasive medium, its stories, characters and commentary so universally known that people in every region of the nation were united by the same cultural experiences.

Our law could have drawn a distinction at this point between constitutionally protected human speech and publication on the one hand, and the distribution of mass entertainment on the other, requiring the latter because of its differing purpose, accessibility to children and greater influence upon society to comply with a higher standard of care than the traditional orator or publisher.[39] Instead, broadcast regulation was

different pay-per-view feature films on each channel running 24 hours a day that a subscriber could select at any time for viewing.

38. U.S. CONST. amend. I.

39. A 1915 U.S. Supreme Court decision actually drew this distinction with respect to motion pictures, ignoring the film company's claim of constitutional free speech protection to classify it as a business subject to

justified only on the much narrower grounds of its use of the public resource of broadcast spectrum space.[40]

Because this legal exception to what otherwise would have been unconstitutional government action was so narrowly drawn, the FCC was unable to extend its authority to regulate the programming practices of radio or television networks.[41] Later, as cable TV emerged as a major electronic media competitor, this restriction on the legal authority of the Commission would have even more profound consequences.

It was difficult for the FCC to regulate cable TV effectively, because cable systems, as the networks, did not require spectrum space to deliver their programs. Lacking the legal authority to impose programming obligations on cable TV, the Commission decided instead in the late 1970s to create a "level playing field" for the two rival media by reducing television's program obligations so that it could compete at parity with cable TV. In essence, the agency adopted the position that since it was not granted by law that authority necessary to regulate cable TV, it would not continue penalizing the broadcast industry by forcing it to comply with program standards that could not be imposed on its competitor.

Congress extended this deregulatory relief still further in 1984 when it released cable systems from virtually all of those programming promises that cable operators had made to municipalities in order to receive a cable franchise.[42] Unfortunately, in doing so, Congress also effectively denied local citizens a voice in the selection of programs that best served the needs of the community, a fundamental regulatory objective of the FCC for the past fifty years. Although the ascendancy of

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state control. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915). In 1952, the Supreme Court for the first time recognized the free speech rights of film in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1953).

40. National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).

41. The FCC could influence these practices indirectly, by using its licensing power over broadcast stations affiliated with each network, or the stations that each of the networks owned to indicate displeasure over certain types of program content, but reactive, negative authority made it difficult for the Commission to achieve positive improvements in programming, such as more cultural features or shows designed to meet the emotional or educational needs of children.

42. Municipalities were able to impose programming and other conditions on cable operators, because cable systems require "easements," or grants of public right-of-way, essential for crossing city property in order to string system trunk lines. The congressional action allowed cable operators to breach virtually every term of the easement contract the city had bargained for in good faith on behalf of its citizens.

the network doomed these efforts in the field of broadcasting, community involvement in cable TV seemed to be on the rise when Congress decided to undercut its legal foundations to relieve the cable industry of any troublesome public responsibility.

In each of these recent electronic media legal and policy proceedings, the one interest that has been virtually ignored is that of the public in the quality of our society's mass cultural environment. The FCC has invoked the term "public interest" on numerous occasions in the past as a ritual phrase to sanctify decisions generally reached on other grounds, but our judicial system still tends to envision these conflicts as pitting the humble orator against a powerful and censorious government. This result occurs even in situations when the orator is actually a corporate giant like NBC or Time-Warner, and the government agency is only some small town cable TV citizen advisory board.

The lack of sophisticated reasoning in mass communication law is simply a reflection of its limited history as an area of jurisprudential thought. It was not until 1919 that the first Supreme Court decision defining the limits of federal authority over freedom of expression was issued, and not until 1925 that free speech was also held to be protected from state or local constraints.[43] The constitutional basis for broadcast regulation was not established by the Court until 1943, and film was only recognized as a communications medium meriting first amendment protection in 1952.[44]

Because American mass communication law remains in its earliest stages of development, its basic principles are still capable of being refined to reflect societal interests it now lacks the capacity to consider. In contrast, for example, both tort and contract law, as most other areas of our jurisprudence, extend back in time through several centuries of legal thought and analysis. During these intervening centuries, constant judicial interpretations of the relative priorities that should be

43. In Schenck v. United States, 249 U.S. 47 (1919), the Court found that the free speech guarantees of the First Amendment limited the authority of Congress to pass legislation restricting freedom of expression. In Gitlow v. New York, 268 U.S. 652 (1925), the Court found that the "due process" clause provision of the Fourteenth Amendment included free speech as one of those privileges that could not unreasonably be restricted by state or local law. Ironically, in both of these cases the conviction of the defendant for free speech activities was upheld.

44. *See National Broadcasting Co.*, 319 U.S. 190; Burstyn v. Wilson, 343 U.S. 495 (1952).

accorded various legal interests in conflict led the case law of torts from crude strict liability to the concept of degrees of causal negligence; as contract evolved from a ritual of rigid formalities to questions of mutuality and intent. So, it is still entirely possible at some future date that the interests of members of the public in the quality of electronic media programming will be recognized, at least under certain circumstances, as deserving as much recognition as the interests of those industries engaged in commissioning and distributing this programming.

ENHANCING THE PUBLIC INTEREST

However attractive it might appear, the "marketplace" solution for making electronic media programming truly responsive to the needs and interests of the public is doomed by its very nature to fail. The responsiveness of any market-based operation, whether advertiser or subscriber supported, is determined by the relative affluence of each group it serves. As a result, such a media marketplace will eagerly fulfill every programming wish or desire of the affluent urban elite, while ignoring the interests of those who have the misfortune to be young, elderly, poor or live in rural areas. While "effective demand" may be an equitable way of determining who may enjoy the privilege of driving a luxury automobile or owning a yacht, it seems less equitable when used to decide whose interests will be served by that mass cultural environment in which we all share.

Another problem with the "marketplace" concept is its tendency to suggest that the Hollywood video and film production industry is a robustly competitive one, capable of providing audiences with a wide array of programs reflecting vastly different social and political viewpoints. In point of fact, the financial risks involved in program production have operated to restrict opportunities in this field to only a small band of veteran producers, directors and writers who tend to share the same positions on most major societal issues.[45] Thus, rather than offering the public a rich medley of divergent, dramatic treatments of questions ranging from AIDS to Zionism, audi-

45. *See, e.g.*, MEDIA RESEARCH CENTER, AND THAT'S THE WAY IT ISN'T (1990). A study of the 1991-92 primetime network schedule by NBC reveals that more than 75% of all programming has been supplied by only five major producers. *See* Dennis Wharton, *NBC Decries Hollywood Grip*, VARIETY, July 8, 1991, at 22.

ence choice is generally limited simply to selecting which minor variation of the same familiar theme to view.

But perhaps the greatest fallacy promoted by the marketplace argument is that because the consumer is king, all that each individual need do to change the nature of television programming is to refuse to watch those programs that offend.[46] This is about as useful as saying that we can solve the problems of a polluted atmosphere simply by closing our windows.

Unlike the novel or newspaper, electronic mass media are not contained within individual usage. Rather, they permeate our mass cultural environment and affect the quality of our lives whether or not we choose to view or listen. Like the nonsmoker in the smoke-filled room, an atmosphere created by others intrudes upon us without concern for our own personal feelings.

To rely solely on personal viewing choices to alter the nature of our programming is about as hopeless as depending only on boycotts of polluting industries to solve all our ecological problems. Recognizing the futility of attempting to save our natural resources through the marketplace tactics alone, the federal government ultimately has begun to adopt standards to protect the interests of each citizen in a clean and healthful environment.[47]

Unless American law at some point recognizes a similar societal interest in maintaining the quality of the nation's electronic media environment, or allows individuals or groups to protect their own mass cultural identities, the current guerrilla

46. Other flaws in this argument include the fact that *individual* viewing choices are not measured by any rating service. Unless a viewer is among that minuscule sampling group whose viewing preferences are reported in a ratings service for broadcasters and advertisers, deciding to watch or not watch a show makes a statement no one hears. In addition, in an advertising world ruled by demographics, even among the viewing choices recorded by a rating service, some votes—those of the young, affluent urban dwellers, for example—have far more impact on programming decisions than those of the poor or elderly.

47. The National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (1989), and the creation of the Environmental Protection Agency in 1970, marked the first major federal recognition of the need to preserve the physical environment. Prior to that time, courts tended to be unsympathetic with environmental concerns that limited industrial development. Typical is the comment of the court in Gardner v. International Shoe Co., 49 N.E.2d 328 (Ill. App. Ct. 1943), that "restraining normal business activity is contrary to public policy." *Id.* at 335. Even as late as 1970, in Boomer v. Atlantic Cement, 257 N.E.2d 870 (N.Y. 1970), a court refused to enjoin industrial pollution because damage caused by the pollution was found to be less than the costs of reducing the pollution.

warfare between the media and organized private interests seems destined to continue unabated, with the ordinary citizen denied any voice in that process of shaping our mass cultural environment which, in turn, shapes every aspect of our lives.

Since these clashes are no longer between government and the soapbox orator, but rather between citizens and those industries that finance and distribute our electronic media programs, the most effective means available for resolving these conflicts would be through Congressional legislation acknowledging the unique role these media perform in our society, and establishing procedures to ensure that extensive power they have over our mass culture is not abused.[48] This might best be accomplished by classifying electronic mass media corporations as "trustees" charged with serving the interests of the public, with their special fiduciary obligation being based both upon the pervasiveness of their mass cultural influence and their ready accessibility to children in the home.[49]

This obligation to offer a balanced array of programming satisfying all major public needs could then be enforced either through private class actions filed in federal court or through federal mediation hearings. In either case, these arguments and negotiations would be taking place for the first time publicly, in open proceedings, rather than secretly behind those closed doors that deny the typical citizen any role in this vital process.

In the long run, however, if experts should be correct in predicting the coming of community based fiber optic delivered video and information systems that will replace over-the-air transmission of electronic mass media services by the year 2115, this mechanism for permitting citizen involvement in the electronic media programming process can then be made both far more efficient and far less complex.[50] Providing citizen

48. This, of course, would require an extensive lobbying effort because the NAB, NCTA (National Cable Television Assn.), the television networks, broadcast stations, MSOs (large cable owners) and cable system operators invest more than $20 million in political public relations and campaign financing activities each year. *See, e.g., NAB Board Adopts $16.6 Million Budget*, BROADCASTING, Jan. 22, 1990, at 42.

49. The Radio Conference of 1922 considered recommending to Congress legislation that would have made radio broadcasters trustees for the benefit of the public, but this concept was eventually rejected, in part because it seemed so unlikely at the time radio would ever become a major medium in the United States. *See* Edward F. Sarno, Jr., *The National Radio Conferences*, 13 J. BROADCASTING 189 (1969).

50. *See, e.g., Telcos Are Knocking at the Door*, BROADCASTING, Apr. 9, 1990, at 53.

access at the local rather than national level will allow those media channels delivered by each system to more closely reflect the values and interests of that community it serves.[51]

Unless individuals in our society are recognized by law as having the same rights to improve their cultural environment as they do to improve their physical environment, they can be expected to continue to resort to any tactic at their disposal to achieve that objective. To describe these groups or their actions as being "censorious," "narrow-minded" or "un-American" simply reveals the arrogance of an industry now virtually free of any legal responsibility towards the public.[52]

In truth, of course, if private pressure on television producers to influence program content actually does constitute "censorious" behavior, then no one engages in censorship more aggressively than the networks themselves with their insistence on forcing violence, car chases or cleavage into any program they agree to distribute. In the last analysis, then, the question is not whether those who create television programs should be free to communicate with the public as they wish, but rather whether that small group of media conglomerates that now finances and delivers these programs should continue to have absolute power to shape television programs as they wish.

American law has finally recognized the right of citizens to protect the quality of their physical environment. Why should law deny citizens a similar right to protect the quality of their mass cultural environment from a contamination that in its own way may well diminish the quality of their lives as much as those noxious fumes or putrid wastes they now have the power to prevent?

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51. As Chief Justice Burger observed when allowing communities some degree of flexibility in determining what descriptions or depictions they would classify as being obscene:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.

Miller v. California, 413 U.S. 15, 32-33 (1973).

52. *See Crusade Sets Out to Clean Up TV*, BROADCASTING, Feb. 9, 1981, at 27.